is to be a re-trial in this case, that the Court should comment on this aspect of the evidence beyond pointing out that no submission was made on behalf of Hassan and Haja Mohideen at the close of the prosecution's case that they were entitled to an acquittal as there was no evidence of common intention, and stating that if such a submission had been made, it would, in the opinion of the Court, have failed. However, for the reasons given earlier in this judgment, the Court is of the opinion that the trial was unsatisfactory and the conviction should be quashed, but in view of all the circumstances of this case, the Court considers it is a proper one in which to order a re-trial and orders a re-trial accordingly.

Re-trial ordered.

Solicitors: *Goho & Co.*

Re MOK PENG CHIA trading as CHOP CHIA MOH; *Ex parte* OFFICIAL ASSIGNEE

[C. A. (Whyatt C.J., Mathew C.J. (F.M.) and Knight J.) October 31, 1956]

[Singapore — Civil Appeal No. 16 of 1956]

Bankruptcy — Fraudulent preference — Bankruptcy Ordinance (Cap.11), s.52(1).

This was an appeal against the decision of the Judge sitting in Bankruptcy in which it was held that a payment of $4,000 by the debtor to the appellant, Chye Chiang Ltd., constituted a fraudulent preference. The evidence showed that at the date of the payment the debtor's firm, of which the debtor was the sole proprietor, was insolvent. The question was whether the dominant motive of the debtor was to prefer the particular creditor.

Held: (1) on the facts the only substantial motive actuating the debtor was that he wished to repay an old friend in full as soon as funds became available and that he wished to make this payment notwithstanding that he was unable at that time to meet his numerous trade debts as they fell due;

(2) consequently the dominant motive of the debtor was a desire to prefer the particular creditor and the payment therefore constituted a fraudulent preference

Cases referred to:—

(1) *Sime Darby & Co. Ltd. v. Official Assignee*, 1 M.C. 116, P.C.

(2) *Peat v. Gresham Trust* (1934) 2 A.C. 252; (1934) All E.R. Rep. 82.

(3) *Re M. Kusler* (1943) Ch. 248.

(4) *In re Fletcher, ex parte Suffolk*, 9 Morr. 8.

In the Court below the following judgment was delivered:—

Whitton J.: — These proceedings arise out of a motion for a declaration that the payment by the bankrupt of the sum of $4,000 to Chye Chiang Ltd. on or about the 11th June 1954 constituted a fraudulent preference to that firm, and for an order that the same be refunded to the Official Assignee.

The bankrupt was the sole proprietor of a business known as Chop Chia Moh carried on at No. 16 Circular Road, Singapore. On 6th July 1954 an Interim Receiver of the property of Mok Peng Chia was appointed, and on the 16th of the same month an Adjudication Order was made against him. From the bankrupt's affidavit of 20th June 1956 it is clear that from at least the end of March 1954 his firm was in financial difficulties.

Regarding the payment of $4,000 to Chye Chiang Ltd. which is now impugned as a fraudulent preference under section 52(1) of the Bankruptcy Ordinance there are in evidence two material affidavits, one by Koh Choon Siang, the Managing Director of Chye Chiang Ltd., the other by Louis Miserus, dated 6th July 1954, made in support of the application for the appointment of an Interim Receiver.

Mr. Koh, whose credibility has not been questioned, states that at the end of February 1954 he complied with a request by Mok Peng Chia, who was an old friend of his, for an interest-free loan of $10 000. and that it was agreed the loan should be repayable in three instalments, the final one of $4,000 to become due on May 28th. The first two instalments were settled on the fixed dates, but just before the final payment should have been made Mok asked Koh if he would postpone presentation of the cheque which had been drawn for the $4,000 until June 11th, as he, Mok had not at the moment money to meet it. Koh agreed to this, but told Mok that it was his company's money which was involved and that if the cheque was not met on June 11th the company would have no alternative but to commence legal proceedings to recover the amount due. The cheque was duly honoured, however, when presented on June 11th. About a week before this request for postponement of presentation Mok had approached Koh for a further loan of $5,000. Koh replied to the effect that he was unwilling to lend any

more money until the $4,000 had been paid off, but that after this had been done the request might be granted favourable consideration. Subsequently to June 11th Mok did approach Koh again, but, though there was no final refusal, no further loan was given.

Louis Miserus was at the date of his affidavit to which I have referred Managing Director of one of the several firms to which Chop Chia Moh was then owing money. The evidential value of his affidavit was assailed by counsel for the respondent firm, an aspect of the matter I shall deal with presently. He stated that on 1st July 1954 he was approached by two Chinese gentlemen who told him Chop Chia Moh was not able to pay the money they owed his firm. As a result of this a meeting of the trade creditors was held on July 2nd and was attended by the same two Chinese gentlemen. One of them informed the meeting that Chop Chia Moh had suffered losses in the years 1952, 1953 and 1954 amounting to $73,000. He proceeded to say that a number of loans had been made to Chop Chia Moh by relatives without interest and that in accordance with Chinese customs they had been paid off in June. He gave particulars of these payments, and among them was the item "Chye Chiang $4,000". The affidavit goes on to describe attempts to reach a composition which came to nothing.

Now there appears to be no doubt this affidavit is admissible in the present proceedings under s.127 of the Bankruptcy Ordinance. Mr. Massey for the respondent firm conceded eventually its admissibility, but submitted it was not of reliable evidential value. While I appreciate that this Court has not had the advantage of personal observation of Mr. Miserus, that his statement was not subjected to cross-examination, and that there are parts of it one might not feel justified in accepting without substantiation, my conclusion is there is no reason to doubt either the reliability of Mr. Miserus when he says one of the Chinese gentlemen gave this information regarding repayments to friends and the details thereof, or the veracity of the information and details given. These two gentlemen were the envoys of Chop Chia Moh and presumably were trying to do their best for that firm in its difficulties. I cannot think of any advantage they could have hoped to gain by putting forward a fabricated story that repayments of loans by relatives had been made, nor is there any suggestion the trade creditors entertained any doubts as to the story's truth.

Turning to the provisions of section 52(1) of the Ordinance, in the first place it seems plain the debtor was unable to pay his debts as they became due. It was pointed out that the statement of his liabilities in his affidavit of 20th June 1956 did not include his personal assets, but having regard to the fact that this firm was a "one-man" affair I consider that, even bearing in mind the factors he owned a car, a mortgaged house and some personal assets the conclusion I have stated is on the available evidence the only reasonable one. This seems all the more so when it is remembered that in the bankrupt's statements of the firm's financial position admitted bad debts constitute a high proportion of the assets. Secondly the impugned transaction was in favour of a creditor. Thirdly the debtor was adjudged bankrupt on a petition presented within three months of payment. Lastly there is the question whether the payment was with a view of giving a preference over other creditors and this is really the essential issue in the case.

The leading local authority on section 52(1) — it was then section 51(1) — is the Privy Council decision in 1927 in *Sime Darby & Company Ltd. v. Official Assignee*[1]. This judgment affirmed the principle that "the question to be determined is one of fact, was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character". It also made it clear that the onus of proof was on the assignee, and, though at a later period some doubt on this point seems to have arisen in England in connection with the corresponding section of the English Bankruptcy Act, the opinion expressed by the Privy Council appears to prevail today (*vide Williams* on Bankruptcy 16th ed. p.364).

There is no direct evidence in the present case, and, accordingly, the Official Assignee has to rely on circumstantial evidence to discharge his burden. In this connection it is appropriate to refer to two leading English cases. In *Peat v. Gresham Trust*[2] Lord Tomlin said (p.262):

> "In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the Court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is not direct evidence and there is room for more than one explanation it is not enough to say there being no direct evidence the intent to prefer must be inferred."

In *Re M. Kusler*[3] Lord Greene M.R. dealing with Lord Tomlin's speech in *Peat v. Gresham* said (p.253):

> "I do not think Lord Tomlin could have meant that, in every case where there is no direct evidence of intention to prefer, the Court is bound to say that the onus of proof is not discharged if any view of the facts not involving an intention to prefer can possibly be taken."

In our case it seems to me it is possible to take two views of the facts: (1) that the payment of $4,000 was made to Koh Choon Siang because he was a friend who had given an interest-free loan, and, Chinese custom enjoined repayment in the circumstances; (2) that the payment was made by reason of Koh Choon Siang's warning of the institution of legal proceedings. In my opinion the evidence conclusively establishes the first view. As I have said there seems to be no reason why, unless it was true, Mok Peng Chia's agent should have told the meeting of trade creditors that the debtor had in the previous month repaid in conformity with Chinese custom individual loans amounting to $40,000 odd to five relatives. It was moreover a statement the accuracy of which, as to the facts of repayment at least, could have been tested subsequently, but it has not, apparently, been questioned. Again had the only repayment been to Koh Choon Siang there would be stronger ground for attaching weight to the warning of legal proceedings made by Koh, but there is no ground for assuming the other four gentlemen had given similar warnings. And indeed had this been the case I do not see why Mok's agent should not have said so. On the other hand I do not think there is justification for any assumption the average debtor in Singapore is likely to respond to the mere threat of legal proceedings if he is not otherwise prepared to pay his debts when they fall due. It was also urged on behalf of the respondent that the settlement of the debt in this case by the final instalment of the $4,000 may have been prompted by the hope of further financial favours from Koh. I feel this is quite likely, though in this connection it is perhaps noteworthy that from the bankrupt's statement it appears he had no difficulty in getting considerable quantities of goods on credit from various firms up to the middle of June at least. He also made some payments to some of these firms during the same month but the payments were small in proportion to the value of the goods he obtained during the same period on credit, and it may well be there is truth in the Official Assignee's surmise that such payments were in the nature of a "bait". There is also ground for suspecting he sold a proportion of these goods to meet his private creditors in view of the facts that according to his accounts he obtained goods to the value of $79,000 odd in June, but on the date of the interim receiving order, July 6th, his assets were estimated by him to produce only $21,000. I think in view of these various considerations there is no justification for rejection of the bankrupt's own accredited agent's explanation as to why the payment was made.

It remains to consider whether from this finding a dominant motive to prefer this particular creditor can be correctly inferred. The essence of the situation as I see it was that the debtor took steps to pay off Mr. Koh Choon Siang and four other friends in full and then approached his trade creditors with this offer of a 20% composition. It is settled law that payment from a sense of duty or moral obligation is not alone sufficient to prevent a payment from being fraudulent (*In re Fletcher, ex parte Suffolk*[4]). Now it seems to me that in this case the dominant motive actuating the debtor was a moral obligation — it was in accordance with Chinese custom to repay in full loans without interest received from relatives, and that being so Mok Peng Chia decided to pay off in full his five relatives and then to negotiate with his trade creditors being fully aware he would not be in a position to satisfy their claims in full. On the evidence I believe he voluntarily adopted this course of action, and while the threat of legal proceedings by Mr. Koh and/or the hope of further loans from him were factors which may have had their influence I consider they were not decisive factors in the making of the payment. The debtor's mental process was in my opinion: "The stage has come when I can no longer pay my debts. It is up to me in the first place to repay my relatives in full if I can. After I do that I shall see what I can do about satisfying the trade creditors." When it is appreciated that the term "fraudulent" in connection with this provision of the bankruptcy law is a "misnomer" (*Williams* p.361) I think that, if my analysis of the decision to pay Mr. Koh his $4,000 is correct, this was a clear case of fraudulent preference, and I find accordingly. I may add that I am aware of no authority which suggests the legal position would be in any way altered if four other creditors were also similarly preferred at the same time.

On these grounds, I hold the Motion in the name of the Official Assignee must succeed, and I order accordingly.

COURT OF APPEAL.

F.R.N.H. Massey for the appellant.

A.W. Ghows (Asst. Official Assignee) for the Official Assignee.

Cur. Adv. Vult.

Whyatt C.J. (with whom Mathew C J. (F.M.) and Knight J. agreed): — This is an appeal from a decision of the Judge sitting in Bankruptcy in which it was held that a payment of $4,000 by the debtor to the appellant, Chye Chiang Ltd., constituted a fraudulent preference. The appellant contends that there was insufficient evidence to justify this finding, and it is necessary, therefore, to examine the material upon which the conclusion is based. It consisted of four affidavits, one dated 6th July 1954 by a creditor named Miserus, one dated 1st June 1955 by Koh Choon Siang, the Managing Director of the appellant, one dated 20th June 1956 by the debtor and one dated 21st June 1956 by the Assistant Official Assignee.

It is clearly established by the evidence of these affidavits that by the end of March 1954 the debtor's firm (of which the debtor was the sole proprietor) was insolvent. At that date there was a deficit of $48,117 after deducting bad debts; at the end of May the deficit had increased to $69,147 and by the middle of July it had increased still further to $92,392. No figures were available for the 11th June (the date on which the sum questioned in the appeal was paid to the appellant) but it is, in our view, a proper and reasonable inference from the figures available for the periods immediately preceding and succeeding the 11th June that the debtor's firm was insolvent at that date. It was, however, contended that the personal assets of the debtor not employed in the business should be taken into account when assessing the debtor's position, and this, of course, is true; but, as the learned Judge pointed out, the debtor's personal assets consisted only of a car and a mortgaged house which could not significantly affect the insolvency resulting from the failure of his business. According to the detor's statement of affairs, his total assets, including his personal assets, were worth only $21,112 on 16th July 1954, and against these assets there were liabilities of $113,504.63. There can be no doubt, therefore, in our opinion, that the learned Judge was right in finding that the debtor was insolvent and unable to pay his debts as they became due at the end of May and early in June 1954 and furthermore it seems clear that this state of affairs had existed for some months previously and continued up to the time of the Receiving Order on the 16th July, 1954.

This being the position in which the debtor found himself at the end of May, 1954, it is necessary to examine against this background the circumstances in which he made the payment of $4,000 to the appellant on the 11th June. The origin of this debt was an agreement between the appellant and the debtor in February 1954 whereby the appellant agreed to lend the debtor $10,000 free of interest because, as the appellant's managing director says in his affidavit, he was an old friend of the debtor. It was agreed that the loan should be repaid in three instalments $2,995 at the end of March, $3 005 at the end of April and a final instalment of $4 000 on 28th May, 1954. The appellant's managing director, according to his affidavit, informed the debtor that he would not object to repayment of the instalments being postponed for a few days provided the postponements did not exceed a week or ten days. The debtor gave the appellant three post-dated cheques to meet the instalments, and the first two instalments were paid when the relative cheques were presented on the due dates. But the third and last instalment could not be met. The debtor realised this on the 27th May, 1954, that is, the day before the cheque was to be presented, and went to see the appellant's managing director in order to put a proposition to him. He asked him not to present the cheque for $4,000 on the following day, as there was insufficient money in the bank to meet it and suggested instead that he should present it on the 11th June. It does not appear from the affidavit why this particular date was selected, but the inference is that the debtor expected that that would be the first day when there would be funds available in his banking account to meet it. The appellant's managing director agreed to the debtor's proposition but added that if the cheque was not met on being presented on the 11th June, he would institute proceedings. The appellant duly presented the cheque on June 11th and got the money. It is this payment which it is said constitutes a fraudulent preference.

The Official Assignee in the Court below relied *inter alia* upon a passage in paragraph 4 of the affidavit of Miserus dated the 6th July 1954 to the effect that two persons, Chua Joo and Sim Mui Hong, had stated at a preliminary meeting of creditors on the 2nd of July 1954 that the debtor was insolvent, and that he had paid off a number of interest-free loans to relatives in June in accordance with Chinese custom. Counsel for the appellant contended before the learned Judge that the affidavit of Miserus was inadmissible but later, according to the Judge's notes, withdrew his objection when his attention was drawn to section 127 of the Bankruptcy Ordinance which makes this affidavit receivable in the present proceedings. Counsel for the appellant maintained, however, that although the affidavit itself was receivable, certain passages in it, in particular the statements of Chua Joo and Sim Mui Hong relating to the debtor's payments to relatives, were plainly hearsay and, therefor, could not be acted upon by the Court. We agree that these statements are hearsay, and in the absence of evidence to show that these two spokesmen spoke with the authority of the debtor or that their statements were subsequently adopted and accepted by the debtor as correct, they are not, in our view, admissible against the debtor. The Official Assignee was unable to establish either of these grounds and, therefore, we think that the appellant's objection to the admissibility of these statements is well-founded.

The Official Assignee is, therefore, compelled to rely upon evidence *aliunde* to establish that this payment was a preferential payment. In the first place, the Official Assignee claims that he has proved that this payment and eight other payments made about the same time to four other creditors were made to relatives and friends, and this at a time when his indebtedness to trade creditors was being steadily increased notwithstanding that he was already insolvent. The appellant on the other hand disputed that these payments to non-trade creditors were, in fact, payments to friends and relatives, but the short answer to this contention is that the Assistant Official Assignee asserted in his affidavit that they were payments to friends and relatives, and his statement on this point was not challenged under cross-examination. We are of the opinion, therefore, that it has been fully established that the debtor was paying off debts due to friends and relatives in the early part of June 1954 while he was still incurring large debts to trade creditors on an increasing scale. It is, of course, true as Counsel for the appellant pointed out, that the Court has no evidence before it as to the circumstances in which these payments to friends and relatives (other than the appellant) were made, and it would be wrong to assume they were preferential payments merely because they were payments to friends and relatives; it may be there were other reasons which adequately explain why these payments were made at that time to these creditors.

In the case of the appellant, however, the surrounding circumstances of the payment are more fully known. In the first place, the managing director of the appellant states in his affidavit that the money was lent to the debtor by the appellant because the debtor was an old friend of his, and it seems clear that both the original loan and the repayments should, therefore, be regarded as being transactions between the debtor and an old friend. Secondly, it is clear from what has been already said that the agreement made on the 27th May 1954 to repay $4,000 to the appellant on the 11th June was made at a time when the debtor was unable to pay his debt when they fell due. Furthermore, it was on the debtor's initiative that this agreement was made. The effect of it was that the appellant's debt was paid in full on the 11th June, at a time when the debtor knew he could not do likewise for his trade creditors. It is reasonable to infer, therefore, that one motive, if not the only motive, which stimulated the debtor to take this initiative on the 27th May was that the appellant or at least, the managing director, was an old friend of his who had lent him money free of interest to help him in his business, and he wanted to ensure that he was repaid in full. The next question is: what other motives operated on the debtor's mind? The only other motives suggested by the appellant were first, the threat of legal proceedings, and, secondly, the possibility of obtaining a further loan from the appellant. As regards the first, it is clear from the affidavit of the managing director of the appellant that there was no mention of legal proceedings until after the new agreement to pay the debt on the 11th June had been agreed upon between the debtor and the appellant and, therefore, it cannot be said to have influenced the debtor when he entered into the agreement.

The second motive suggested is that the debtor hoped that if he made a satisfactory arrangement for paying off the final instalment

on the first loan, he would later be able to negotiate a new loan with the appellant. The evidence on this point is nebulous and vague. There was some discussion between the debtor and the appellant's managing director a week prior to the arrangement of the 27th May about a further loan of $5,000 but nothing was apparently said about the period of the loan or of the terms of repayment. There may have been some vague expectation in the mind of the debtor that he might get some further financial assistance by way of loan from the appellant, but it seems unlikely that it ever took concrete shape and, certainly, not to the extent when it could be said to have exercised a significant influence on the mind of the debtor when he made the arrangement with the appellant on the 27th May.

It follows, therefore, in our view, that the only substantial motive actuating the debtor on the 27th May was that he wished to repay an old friend in full as soon as funds became available in the bank to meet the post-dated cheque for $4,000 and that he wished to make this payment notwithstanding that he was unable at that time to meet his numerous trade debts as they fell due. This being so, the dominant motive of the debtor in our judgment was a desire to prefer this particular creditor and, therefore, this payment constituted a fraudulent preference.

For these reasons this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill.*

Re S. SYED AHMAD & CO.; Ex parte THE OFFICIAL ASSIGNEE

[O. Bk. J. (Whyatt C.J.) June 20, 1958]

[Singapore — In Bankruptcy No. 24 of 1958]

Bankruptcy — Goods seized under Writ of Seizure and Sale — Possession by Sheriff for 23 days — Payment out — Act of Bankruptcy — Notice.

In the Colony a debtor commits an act of bankruptcy the moment execution against him has been levied by seizure of his property under process in an action or in any civil proceeding in the High Court or District Court where the judgment including costs is for an amount exceeding $500. Seizure alone constitutes an act of bankruptcy. A voluntary payment made by the debtor to release property seized in execution would not entitle the creditor to retain the benefit of the execution under section 48 of the Bankruptcy Ordinance if a receiving order is made against the debtor within 12 months from the date thereof. In such a case the Official Assignee is entitled to require the execution creditor to refund moneys paid to him by the debtor to avoid a sale by the Sheriff. Under the corresponding Act in England on the other hand, an act of bankruptcy is not complete until the goods have been either sold or held by the Sheriff for 21 days.

Cases referred to:—

(1) *Figg v. Moore Bros.*, (1894) 2 Q.B. 690.
(2) *Ex parte Villars*, L.R. 9 Ch.D. 432.
(3) *John Burns-Burns v. Brown*, (1895) 1 Q.B. 324.

BANKRUPTCY.

A. W. Ghows (Asst. Official Assignee) for the Official Assignee.

M. Karthigesu for the execution creditors.

Cur. Adv. Vult.

Whyatt C.J.: — This application by the Official Assignee raises an interesting point as to the right of the Official Assignee to require an execution creditor to refund moneys paid to him by the debtor to avoid a sale by the Sheriff within twelve months of the date of the adjudication.

The facts are simple and may be briefly summarised as follows. On the 29th November 1957, a creditor named Fielding, Brown & Finch (Far East) Ltd., having obtained judgment against S. Syed Ahamed & Co. for $5,751.88 and costs, issued execution against the firm by seizure of the debtor's property under a writ of seizure and sale. Four days later, on the 3rd December, the debtor paid to the Sheriff $5,096.71 in order to avoid a sale and obtained a release of the property, and the Sheriff, after holding these moneys for fourteen days as required by section 49 (2) of the Bankruptcy Ordinance, paid them over to the solicitors for the execution creditors on the 18th December. Shortly afterwards, on the 30th December, another judgment creditor levied execution against S. Syed Ahamed & Co. but this time there was no payment forthcoming to obtain the release of the debtor's goods. Consequently a bankruptcy petition was presented on the 11th January 1958 and a Receiving Order made against the firm on the 14th February; one of the partners was adjudicated bankrupt the same day and the remaining partners were adjudicated bankrupt on the 2nd May. On these facts, the Official Assignee claims to be entitled to recover the moneys paid to Fielding, Brown & Finch (Far East) Ltd. on the 18th December.